Nos. 83-1065, 83-1240.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the County of Oneida, New York, and the County of Madison, New York, as Respondents in No. 83-1240.

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Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, and assuming that as a result the present occupiers of that land have been adjudged liable in trespass to the descendants of that tribe, the present occupiers have a cause of action in indemnity against the State under New York or federal law;

2. Whether ancillary subject matter jurisdiction exists for the state law claim;

3. Whether the State waived its immunity to suit by participating in the 1795 conveyance.

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Statement of the Case.

Most of the facts pertinent to the issues raised in this brief are set forth in the Counties' brief as petitioners in No. 83-1065, and need not be repeated here. It is sufficient to note that the liability of the Counties to the Oneidas is premised upon a finding that the State purchased certain land from the original Oneida Nation on September 15, 1795, in violation of the Trade and Intercourse Act of 1793. The Counties had nothing whatsoever to do with that transaction; they did not even exist in 1795. The County of Oneida was not created until 1798, and the County of Madison was not until 1806. 1798 N.Y. Laws c. 31; 1806 N.Y. Laws c. 70. The Counties came into possession of the land well after the 1795 transaction. No one has ever questioned that they acquired, improved, and have held the land in good faith.

Summary of Argument.

1. The Counties' third-party claim for indemnity is based upon both New York and federal law. Indemnity is available under the law of New York whenever a party has discharged an obligation properly owed by another, and "simple fairness" requires indemnification. Simple fairness mandates that the Counties be indemnified by the State. They are absolutely innocent of any wrongdoing, and in fact did not even exist at the time of the 1795 transaction.

The Counties' federal claim against the State is derived from precisely the same sources as the Oneidas' claim against the Counties. The Counties do not concede that the Oneidas have such a claim, but contend that if such a right is created for the Oneidas, this Court should be no less flexible in creating a right for the Counties (pp. 3-8).

2. The jurisdictional basis of the Counties' federal law claim is 28 U.S.C. § 1331. Jurisdiction for the Counties' state law claim is based upon well-settled principles of ancillary jurisdiction. The State's argument confuses subject matter jurisdiction and Eleventh Amendment immunity, which are analytically distinct and must be addressed separately (pp. 8-12).

3. The State constructively waived its immunity, under the rule of *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964), by transacting with the original Oneida Nation in 1795. The State's purchase was a proprietary act, made for profit, and did not involve traditional or core state governmental activity. Furthermore, the State purchased the land with actual knowledge of a federal statute expressly prohibiting such purchases; indeed, the State's conduct constituted a federal crime. The State accordingly waived whatever immunity it may otherwise have enjoyed. The fact that the Counties are not Indians, and that they are asserting a claim in a third-party context, rather than directly, has no effect on whether the State is immune (pp. 12-24).

Argument.

I. The State of New York Should Indemnify the Counties for Any Liability Imposed Against Them in this Action.

The argument of the Counties is simple. The Counties were not parties to the 1795 transaction between the State and the original Oneida Nation, by which the State is alleged to have wrongfully dispossessed the Oneidas of their land. Because the Counties are in possession of the land, however, they have been found liable to the Oneidas. The State was the entity which committed the wrong; the Counties, as the District Court found, are good faith occupiers who had no connection with that wrong. It would be unfair to force the Counties to pay the judgment, and to allow the State to escape liability would unjustly enrich it. Accordingly, the State should fully indemnify the Counties for any liability charged against them.

The Counties' claim is grounded in both state and federal law.

A. *The Counties Are Entitled to Indemnity under New York Law.*

The principles underlying the right of indemnification under New York law were well-expressed in a recent opinion of the New York Court of Appeals. In *McDermott* v. *City of New York*, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460 (1980), Chief Judge Cooke noted:

> Conceptually, implied indemnification finds its roots in the principles of equity. It is nothing short of *simple fairness* to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, § 76). *To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs.*
>
> . . . . . .
>
> As was true with many unjust enrichment cases, the vehicle through which the law operated was the quasi contract . . . . Thus, the rule developed that "[w]here payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law."

Id., 50 N.Y.2d at 216-17, 428 N.Y.S.2d at 646, 406 N.E.2d at 462 (citations and footnote omitted; emphasis added). *Accord, Brown* v. *Rosenbaum*, 287 N.Y. 510, 518-19, 41 N.E.2d 77, 80-81 (1942); *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 217-18, 67 N.E. 439, 439-40 (1903); *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*,

134 N.Y. 461, 467-68, 31 N.E. 987, 989 (1892); *City of Brooklyn* v. *Brooklyn City R.R.*, 47 N.Y. 475, 486-87 (1872); 23 N.Y.Jur.2d *Contribution, Indemnity, and Subrogation*, §§ 62-64.

Indemnity is allowed in scores of situations where an innocent party has been found technically liable, and seeks to pass that liability on to the party who actually committed the wrongful act. Thus, for example, retailers and distributors selling defective products are entitled to indemnity from the party who manufactured the product, *Spector* v. *K-Mart Corp.*, 99 A.D.2d 605, 471 N.Y.S.2d 711 (1984); *All-Tronics, Inc.* v. *Ampelectric Co.*, 44 A.D.2d 693, 354 N.Y.S.2d 154 (1974); *Catanello* v. *Cudahy Packing Co.*, 264 A.D. 723, 34 N.Y.S.2d 37 (1942); property owners are entitled to indemnity from employees and contractors working on the property who negligently cause injury to another, *Mauro* v. *McCrindle*, 70 A.D.2d 77, 419 N.Y.S.2d 710 (1979) *aff'd*, 52 N.Y.2d 719, 436 N.Y.S.2d 273, 417 N.E.2d 567 (1980); *Tipaldi* v. *Riverside Memorial Chapel*, 273 A.D. 414, 78 N.Y.S.2d 12, *aff'd*, 298 N.Y. 686, 82 N.E.2d 585 (1948); hospitals are entitled to indemnity from negligent physicians, *Cox* v. *Cordice*, 90 A.D.2d 297, 457 N.Y.S.2d 2 (1982), *aff'd*, 60 N.Y.2d 723, 469 N.Y.S.2d 80, 456 N.E.2d 1203 (1983); *Macari* v. *Parsons Hospital*, 26 A.D.2d 584, 271 N.Y.S.2d 1009 (1966); motor vehicle owners are entitled to indemnity from negligent operators, *Dittman* v. *Davis*, 274 A.D. 836, 80 N.Y.S.2d 737 (1948) *aff'd*, 299 N.Y. 601, 86 N.E.2d 175 (1949); and lessors are entitled to indemnity from lessees who negligently breach their duty to exercise due care while in occupation of premises, *Richardson* v. *Cannold Holding Corp.*, 283 A.D. 789, 128 N.Y.S.2d 814 (1954), *aff'd*, 308 N.Y. 932, 127 N.E.2d 85 (1955); *Merkle* v. *110 Glen Street Realty Corp.*, 282 A.D 617,

125 N.Y.S.2d 881 (1953). The right to indemnity is not premised upon any particular relationship or duty between the parties, but "rests instead on the parties' relative responsibility as determined on the facts as a whole." *Mauro* v. *McCrindle*, *supra*, 710 A.D.2d at 83, 419 N.Y.S.2d at 714-15. In short, the concept is employed whenever "simple fairness" compels it, and no reason exists to bar it.

Simple fairness requires that the State assumes the liability which it wholly created. The Counties did not exist in 1795, did not participate in the conveyance, and should not now be forced to pay.[1]

The State argues at great length that the District Court and Court of Appeals erroneously applied New York law, chiefly because those courts refused to treat the indemnity claim as one for an implied covenant of quiet enjoyment. The State's view of the law is clearly incorrect.[2] In any event, the State's

[1] Furthermore, the Counties justifiably relied on the actions of the State and the United States in believing they held clear title to the land. The State Surveyor General laid out the land in question in lots, and the State repeatedly treated the 1795 transaction as valid in later treaties with the Oneidas. (Jt. App. at 137a-141a, 142a, 143a.) The United States not only approved those later treaties, 434 F.Supp. at 535 (Jt. App. at 58a), but also repeatedly disclaimed responsibility for Eastern Indian affairs. *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). *See* the Counties' brief as petitioners in No. 83-1065, at 41-44.

[2] The Counties do not claim in contract against the State, based upon an implied warranty of title; they claim in tort on principles of indemnity. N.Y. Real Prop. Law § 251, which precludes the implication of covenants in transfers of real estate, is designed to promote stability in real estate titles by requiring that covenants be expressly set out in deeds. *See Burwell* v. *Jackson*, 9 N.Y. 535, 541 (1854). That statute was *not* intended to bar all tort claims in which a transfer of real estate happened to be involved. Indeed, even the authority cited by the State states that § 251 applies only in contractual contexts "[w]here both parties are innocent of fraud," *Whittemore* v. *Farrington*, 76 N.Y. 452 (1879) or where no "fraud or mutual mistake" is involved, *Coffin* v. *City of Brooklyn*, 116 N.Y. 159 (1889), making it clear that tort law was not intended to be entirely supplanted. The circumstances of this action are *sui generis* and cannot be controlled by a statute having a vastly different purpose.

argument is based on issues of state law which have been passed upon by two local federal courts, which do not implicate constitutional principles, and which accordingly do not warrant further attention from this Court. The argument that the law of real property would be "completely upset" is wholly without merit; an affirmance of the ruling below would not allow a "garden-variety" grantee to sue his grantor for implied indemnity where title has failed, any more than this Court's holding in this action in 1974 permits non-Indian grantees to bring suit in federal court. *See* 414 U.S. at 684 (Rehnquist, J., concurring).

In short, if any wrong has been committed in this case, it has been committed by the State of New York. It would be grossly unfair to force the taxpayers of the Counties to shoulder the burden of rectifying the wrongful conduct of the State.

B. *The Counties Are Entitled to Indemnity under Federal Law.*

The Counties also seek indemnity based upon federal common law and the Trade and Intercourse Act of 1793. As set forth in their brief as petitioners in No. 83-1065, the Counties contend that the Oneidas have no right to relief under federal law. The Counties further contend, however, that it would be manifestly unjust to hold that the Oneidas have a claim against the Counties under federal law, but to leave the Counties to fend for themselves under state law when they seek to pass that liability onto the wrongdoing party. If it is proper to fashion a right for the Oneidas under the peculiar circumstances of this action, the Court ought to be no less flexible in fashioning a right on behalf of innocent landowning defendants.

It is worth remarking that the ostensible purpose behind this lengthy and elaborate lawsuit is the vindication of the principles

set forth in the Trade and Intercourse Act. Whether those principles are worthy of vindication at this late date, and against these innocent parties, is the subject of another brief in this litigation; but if any sense is to be made of their vindication, the wrongdoer must be charged with the liability. Anything short of that results in the unjust enrichment of the wrongdoer, and a clear injustice to the party forced to pay. *See Gordon* v. *Burr*, 506 F.2d 1080, 1084-85 (2d Cir. 1974).

It is also important to focus again on the strange context in which this action arises. The events on which the rights of the parties turn occurred almost two centuries ago, yet the courts below declined to apply the usual time-barring doctrines — such as the statute of limitations and laches — to the Oneidas. The suit presages the forced transfer of sovereignty over an enormous tract of land after nearly two hundred years of knowing acquiescence by Congress, yet the courts have held that Congress never intended to treat the 1795 transaction as valid. The fiction that the present Oneidas are the same entity as the Oneida Nation of 1795 has been accepted without hesitation. In short, the federal courts, acting sometimes with remarkable dexterity, have removed every ordinary legal barrier to the prosecution of this action. The great solicitude which the courts have demonstrated toward the Oneidas in prosecuting this claim ought to be paralleled, at least in part, by establishing a federal right on behalf of the Counties, who are absolutely innocent of any wrongdoing. Anything less works an injustice in the extreme.

II. The Counties' Claim for Indemnity Falls Within the Ancillary Subject Matter Jurisdiction of the District Court.

The Counties' third-party claim against the state is based upon two sources: New York law of indemnity and federal law.

The Counties maintain that subject matter jurisdiction for the former exists under principles of ancillary jurisdiction, and that the latter presents a federal question within the meaning of 28 U.S.C. § 1331.[3]

The State argues that no ancillary jurisdiction exists over the Counties' state law claim, principally on the grounds that the Eleventh Amendment stands as a bar.[4] That argument, however, confuses the issues of subject matter jurisdiction and sovereign immunity. While both are limits on the judicial power of federal courts, the two concepts are analytically distinct and must be addressed separately.[5]

Ancillary jurisdiction is

> an ill-defined, judicially developed concept based on the premise that a district court acquires jurisdiction over a case or controversy in its entirety and, as an incident to the disposition of a dispute that is properly before it, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented.

6 C. Wright & Miller, Federal Practice & Procedure: Civil § 1444. Since *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), its chief use has been in the context of multiparty practice, such as third-party claims, compulsory counterclaims, cross-claims, and intervention as of right. *See Owen*

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[3] Of course, the Counties' state law claim for indemnity is also pendent to their federal law claim for indemnity, further supporting the exercise of federal jurisdiction over the state law claim.

[4] The State does not apparently dispute the federal question jurisdiction asserted by the Counties.

[5] One critical distinction is that sovereign immunity may be waived, whereas a lack of subject matter jurisdiction cannot be consented to or cured. *Cf., e.g., Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) ("immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure") *with Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908) (parties cannot consent to federal subject matter jurisdiction).

Equipment & Erection Co. v. *Kroger*, 437 U.S. 365, 375 n.18 (1978).

In third-party practice, ancillary jurisdiction has been employed principally in order to entertain claims for contribution or indemnity. Thus, cases in which state law indemnity claims have been found to be within the ancillary jurisdiction of the federal courts are legion. *See, e.g., Pennsylvania R. R.* v. *Erie Ave. Warehouse Co.*, 302 F.2d 843, 845 (3d Cir. 1962); *Southern Milling Co.* v. *United States*, 270 F.2d 80, 84 (5th Cir. 1959); *Dery* v. *Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Waylander-Peterson Co.* v. *Great Northern Ry.*, 201 F.2d 408, 415 (8th Cir. 1953); *Gunnell* v. *Amoco Oil Co.*, 490 F. Supp. 67, 68 n.1 (W.D. Mich. 1980); *Testa* v. *Winquist*, 451 F.Supp. 388, 396 (D.R.I. 1978); *Ross* v. *Penn Central Transportation Co.*, 433 F.Supp. 306, 308 (W.D. N.Y. 1977); *Lyons* v. *Marrud, Inc.*, 46 F.R.D. 451, 454 (S.D.N.Y. 1968); *Fong* v. *United States*, 21 F.R.D. 385, 387 (N.D. Cal. 1957). The holding below that ancillary jurisdiction exists for the Counties' claim was therefore simply a straightforward application of a basic, and long-established, doctrine.

Not surprisingly, the Counties' claim falls squarely within the analytic framework set forth in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 (1978), for determining when federal courts can exercise jurisdiction over nonfederal claims. First, both the Counties' claim for indemnity and the Oneidas' primary claim obviously arise from a "common nucleus of operative fact," the 1795 transaction. Second, the jurisdictional statutes upon which the Oneidas' claim is based, 28 U.S.C. §§ 1331, 1362, contain no limitations, express or implied, upon the exercise of ancillary jurisdiction. Finally, and most importantly, the context in which the Counties' nonfederal claim is asserted is *precisely* the context outlined in *Owen* as historically supporting the exercise of ancillary jurisdiction. The *Owen* Court expressly stated that where a defendant impleads a third-party defendant for purposes of asserting a nonfederal claim, such a claim is "*always*" ancillary to the federal claim. 437 U.S. at 376 (emphasis added).

The State's argument rests chiefly on two decisions of this Court: *Pennhurst State School & Hospital* v. *Halderman*, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), and *Aldinger* v. *Howard*, 427 U.S. 1 (1976).[6] *Pennhurst* holds that the mere *existence* of a pendent state law claim — standing by itself — cannot override the Eleventh Amendment immunity of a state. The issue of whether that immunity had been waived was neither raised by the parties nor considered by the Court. The Counties do *not* maintain that the mere *existence* of an ancillary state law claim — standing by itself — can override the State's immunity; rather, they maintain that the State has waived its immunity to suit through an independent act, its transaction with the Oneidas. *See* text, *infra*, at 12-24. *Aldinger* is even less on point; there, the Court held that the exercise of pendent jurisdiction was precluded by the particular jurisdictional statute at issue, 28 U.S.C. § 1343(3). As noted, there is nothing whatsoever in 28 U.S.C. §§ 1331 and 1362 which expressly or implicitly suggests a limitation on the exercise of ancillary jurisdiction.[7]

[6]Both *Pennhurst* and *Aldinger* involved assertions of *pendent*, rather than ancillary, jurisdiction. While the State suggests that the two doctrines are interchangeable, State's Brief at 37 (note), in truth the equitable considerations behind ancillary jurisdiction are far more compelling. Pendent jurisdiction is typically asserted by plaintiffs; "[b]y contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will. . . ." *Owen Equipment & Erection Co.* v. *Kroger*, *supra*, 437 U.S. at 376 (1978). The denial of ancillary jurisdiction therefore forces a defendant into the difficulty and expense of maintaining a separate lawsuit in a separate court, before different judges and juries. *See Testa* v. *Winquist*, *supra*, 451 F.Supp. at 396; *Revere Copper & Brass, Inc.* v. *Aetna Casualty & Surety Co.*, 426 F.2d 709, 716 (5th Cir. 1970).

[7]While the Court in *Aldinger* did observe that "[i]f the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim," 427 U.S. at 18, that is a long step from asserting that such a party may never be joined. Indeed, the

The additional cases cited by the State, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), and *Jones* v. *Scofield Bros., Inc.*, 73 F.Supp. 395 (D.Md. 1947), simply hold that sovereign immunity may bar an otherwise valid cross-claim or third-party claim. It is well-established, however, that where a state has waived its immunity, it is fully subject to an ancillary state law claim. *See, e.g., Laird* v. *Chrysler Corp.*, 92 F.R.D. 473, 474 (D. Mass. 1981); *Chicago & North Western Transportation Co.* v. *Hurst Excavating, Inc.*, 498 F.Supp. 1, 3 (N.D. Iowa 1978); *Flores* v. *Norton & Ramsey Lines, Inc.*, 352 F.Supp. 150 (W.D. Tex. 1972).[8]

In summary, ancillary jurisdiction plainly exists over third-party claims for indemnity such as that asserted by the Counties. The sole remaining question is whether the Counties' claim is barred by the Eleventh Amendment.

III. The Counties' Claim for Indemnity is Not Barred by the Eleventh Amendment.

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

adoption of such a principle would wholly erase ancillary jurisdiction over third-party claims. As one court has noted:

> It is literally hornbook law that the court's ancillary jurisdiction over a third-party claim requires no independent basis of jurisdiction provided that the federal court has . . . jurisdiction over the main claim. . . . *By definition*, ancillary jurisdiction in this context contemplates impleading a party over whom the federal court would otherwise have no jurisdiction.

Testa v. *Winquist, supra*, 451 F. Supp. at 396 (emphasis added).

[8] Similarly, a state is subject to third-party claims for indemnity brought by the United States, as the Eleventh Amendment does not apply to such suits. *See, e.g., United States* v. *Illinois*, 454 F.2d 297 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); *Lee* v. *Brooks*, 315 F.Supp. 729 (D. Hawaii 1970); *Williams* v. *United States*, 42 F.R.D. 609 (S.D. N.Y. 1967).

> against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. Despite its limited literal language, the amendment has long been held to bar suits against an unconsenting state by its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1 (1890).[9]

Although the Eleventh Amendment is a limit on the judicial power of the federal courts, and "partakes of the nature of a jurisdictional bar," *Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1973), it may be waived by Congress acting pursuant to the authority delegated to it by the states under the federal Constitution. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). A state may also waive its immunity from suit, whether by statute, *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 392 (1894), or by engaging in a particular course of conduct, *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964).

The question before the Court is whether the State constructively waived its immunity by transacting with the original Oneida Nation in 1795.[10] That question is controlled by a trilogy

[9] Jurisprudence under the Eleventh Amendment typically "has focused not on the language of the Eleventh Amendment, but on the concept of sovereign immunity of which it is a reminder and 'exemplification'." L. Tribe, American Constitutional Law 131, citing *Ex Parte New York*, 256 U.S. 490, 497 (1921). The relationship between the Eleventh Amendment and sovereign immunity has been a source of controversy, both among members of this Court and among commentators. *Cf., e.g., Employees* v. *Dept. of Public Health & Welfare of Missouri*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring), *with id.*, 411 U.S. at 309-324 (Brennan, J., dissenting). *See generally* Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U.Pa.L.Rev. 515 (1978) and Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits upon the States, 126 U.Pa.L.Rev. 1203 (1978).

[10] The State's transaction with the original Oneida Nation occurred after the ratification of the Eleventh Amendment, although both occurred in 1795. The

of cases decided by this Court: *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964); *Employees* v. *Dept. of Public Health & Welfare of Missouri*, 411 U.S. 279 (1973); and *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

In *Parden*, the State of Alabama owned and operated a railroad in interstate commerce. Congress, acting pursuant to the powers delegated to it under the Commerce Clause, had previously enacted the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which provides *inter alia* that a railroad employee may sue his employer for personal injuries sustained in the course of his employment. An injured employee sued Alabama under the FELA, and Alabama raised the defense of sovereign immunity. The Court, however, found that Alabama

amendment was ratified on February 7, 1795, and the transaction occurred on September 15, 1795.

The ratification of the Eleventh Amendment has been a subject of some confusion. When the proposed amendment was placed before the states, on March 4, 1794, there were then 15 states: the original 13 plus Vermont and Kentucky. C. Jacobs, The Eleventh Amendment and Sovereign Immunity 67 (1972) (hereinafter "Jacobs"). The requisite three-fourths majority needed to adopt the amendment was thus 12 states. U.S. Const., Art. V. The twelfth state to ratify the amendment was North Carolina, which did so on February 7, 1795. Documents Relating to the Proposal and Ratification of the Eleventh Amendment, Ratified Amendments, National Archives, Record Group 11, *cited in* D. Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga.L.Rev. 207, 227-28 n.77 (1968) (hereinafter "Mathis"); Jacobs, at 67 & n.96. The amendment automatically took effect upon North Carolina's ratification. *Dillon* v. *Gloss*, 256 U.S. 368, 376 (1921).

The Eleventh Amendment is often erroneously thought to have been adopted on January 8, 1798, the date that President Adams transmitted a message to Congress stating that three-fourths of the states had ratified the proposed amendment. *See, e.g.*, C. Warren, 1 *The Supreme Court in United States History* 1789-1918, 101 (1922 ed.) (hereinafter "Warren"). That message was incorrect in several respects, and in fact came nearly three years after the twelfth state had ratified the amendment. Jacobs at 67; Mathis, at 227 n.77. Professor Warren observed that "ratification was promulgated" in an "extremely informal and careless manner." Warren, at 101 n.2.

The Trade and Intercourse Act of 1793 was enacted after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), and before the ratification of the Eleventh Amendment, a chronology with potentially important implications for the resolution of this matter. *See* text, *infra*, at 19.

had waived its immunity by the act of operating a railroad. It first noted that "[b]y empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Id.*, 377 U.S. at 192. It then held that Congress, in enacting the FELA, intended to subject all operators of railroads to suit under the act, and that by choosing to operate a railroad in interstate commerce after enactment of the statute, Alabama had in effect consented to be sued. The Court dismissed the argument that Alabama had not waived its immunity under its own state laws. "[W]hen a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.*, 377 U.S. at 196.

In *Employees*, the Court ruled that the principle established by *Parden* did not automatically extend to all exercises of congressional power under the Commerce Clause. *Employees* involved a suit brought by employees of Missouri state hospitals against the state under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. The Court held that Congress' extension of the coverage of the FLSA to state employees in 1966 did not constitute intent to waive the states' Eleventh Amendment immunity in suits brought under the Act. The Court distinguished *Parden* on the grounds that it involved a proprietary enterprise which was "rather isolated" and outside the scope of traditional activity. 411 U.S. at 284-85. While the Court noted that Congress possessed the constitutional power to waive the states' immunity to suit under circumstances such as those presented in *Employees*, it held that clear evidence of such Congressional intent would be required before finding such a waiver. *Id*. The Court examined the statutory framework and concluded that no such evidence existed.

Justice Marshall, concurring in the result, expanded on the difference between *Parden* and *Employees*. In the latter case, he noted,

> the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. . . . In *Parden*, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case.

Id., 411 U.S. at 296-97 (citation and footnote omitted).

Thus, in *Parden*, Congress had enacted a statute regulating a particular field, in which the participants were typically private individuals; afterwards, the state, with knowledge of the statutory framework, engaged in proprietary activity in that field. The state was thereby held to have waived its sovereign immunity. In *Employees*, the state had been engaging in a vital and traditional governmental activity for many years when Congress sought to regulate those activities for the first time. The Court simply held that clear evidence of Congressional intent to subject the state to liability would be required, and none was forthcoming.[11]

[11]Such clear evidence was later found by the Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (suits under Title VII of the Civil Rights Act of 1964) and in *Hutto*

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court noted an additional requirement for a finding of constructive waiver. *Edelman* involved a claim by a private party that the State of Illinois was improperly administering a federal-state program of Aid to the Aged, Blind, or Disabled. The plaintiff argued that the State had waived its Eleventh Amendment immunity participating in the federal program. The Court refused to find such a waiver, and distinguished its prior holdings:

> Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. . . . The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
>
> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* . . . as well.

Id., 415 U.S. at 672 (footnote omitted). The Court went on to hold that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." *Id.*, at 673. *Accord, Florida*

v. *Finney*, 437 U.S. 678 (1978) (award of attorneys' fees under Civil Rights Attorneys' Fees Awards Act of 1976). *Fitzpatrick* noted an additional source of congressional authority to waive the Eleventh Amendment immunity of the states: Section 5 of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 5.

Dept. of Health v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam).

Thus, the analytic framework established by *Parden*, *Employees*, and *Edelman* in determining whether a state has waived its immunity may be described as follows. First, under *Edelman*, the Court must find that the congressional enactment in question literally applies to the activity of the state. Second, the Court must determine whether that activity is governed by *Parden* or *Employees*. If it is the latter, the Court must find clear evidence of congressional intent to subject the state to liability or the rule of constructive waiver will not apply.

The threshold requirement of *Edelman* is easily satisfied here. The Trade and Intercourse Act of 1793, by its terms, applies to *any* "purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians." That statute literally encompasses purchases made by a state, and has been held to apply to such purchases. *See Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 626 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).[12] Indeed, if that statute does *not* apply to the purchase of Indian land by a state, this entire lawsuit should be dismissed, for no violation of law has occurred.

While the 1793 Act does not expressly authorize the institution of a civil suit against a state, it also does not expressly authorize civil suits against the Counties or any other party. If the 1793 Act is to be read literally, the Oneidas' principal claim fails, and the Eleventh Amendment need not be addressed. If, however, rights are to be read into the statute, it would be grossly unfair to conclude that the statute authorizes suit against a class of defendants which includes the Counties and other

[12] This Court's 1974 decision in this action, in fact, was premised on the assumption that the Trade and Intercourse Act applied to the State's purchase. 414 U.S. 661 (1974).

innocent landowners, but which does not include the State, the entity which actually violated the statue.

A further point should be noted. The Trade and Intercourse Act of 1793 was enacted *after* this Court ruled in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793) that states were not immune from suit in federal courts, and *before* the ratification of the Eleventh Amendment, which reversed that result. *Chisholm* was decided on February 18, 1793, 2 U.S. at 249; the statute was enacted on March 1, 1793, 1 Stat. 329; and the Eleventh Amendment was ratified on February 7, 1795. *See* text, *supra*, at 13 n.10.

The Congress which enacted the 1793 Act must be presumed to have known — and undoubtedly did know, in light of the firestorm of controversy surrounding *Chisholm* — that the federal judiciary then considered the states to be generally subject to suit in federal courts. Accordingly, clear indication of congressional intent to subject the states to suit should *not* be required; rather, an expression of intent to *immunize* the states from suit under the 1793 Act should be required. To hold otherwise is to require clear congressional intent to abrogate an amendment which had not yet been adopted.[13]

Having satisfied the initial requirement of *Edelman*, the second level of inquiry is whether this action more closely resembles *Parden* or *Employees* for purposes of determining whether a constructive waiver has occurred. The Counties submit that this action is closely analogous to *Parden*, and in fact presents a more compelling set of circumstances for a finding of waiver than even *Parden* itself.

First, like *Parden*, this action involves a proprietary activity, undertaken chiefly for the purpose of making a profit. As the Court of Appeals noted, the State quickly resold the land purchased from the Oneidas at fifty cents per acre to white land speculators and settlers for approximately $3.53 per acre,

[13] The foregoing, of course, assumes that private rights of action are available under the 1793 Act, a point which the Counties by no means concede.

a profit exceeding 700%. 719 F.2d at 529. (Jt. App. at 213a).[14] The State was therefore voluntarily acting as a private participant in the marketplace, not as a sovereign authority. *See Mills Music, Inc.* v. *Arizona*, 591 F.2d 1278, 1286 (9th Cir. 1979) (state adopted copyrighted song as theme for state fair; constructive waiver found).[15]

Second, this action does not involve traditional or core state governmental activity, such as the maintenance of hospitals and asylums or the operation of a public welfare system. *Cf. Employees* v. *Dept. of Public Health & Welfare of Missouri, supra*; *Edelman* v. *Jordan, supra*. Federalism concerns which dominate Eleventh Amendment jurisprudence are far less compelling in such a context.

Third, the statutory framework at issue was already in place at the time of the activity. The Trade and Intercourse Act was enacted in 1793, and the purchase of Oneida land took place in 1795. Indeed, the State had *actual* — not just constructive — knowledge of the 1793 Act, and transacted with the original Oneida Nation in deliberate disregard of its prohibitions. 434

[14] The State suggests that it acted as a sovereign, rather than a proprietor, because it purchased the land in order to make it available for settlement. State's Brief, at 42 and note. The question of whether a state's activity was undertaken as a sovereign or as a proprietor (or, more accurately, where such activity falls on a sovereign-proprietor continuum) cannot be resolved by simply determining whether *any* public purpose was served by the activity. Alabama's operation of a railroad in *Parden*, for example, undoubtedly served the public purpose of facilitating commerce in the port of Mobile. In the present case, the State did not give the land away or resell it at cost, which would have been the logical means to promote rapid settlement; it quickly resold most of it to speculators at an enormous profit. The State's actions stand in sharp contrast to such legislative programs as the Homestead Act, now codified at 43 U.S.C. §§ 161 *et seq.*, where public lands were made available for settlement at little or no cost.

[15] The State's acquisition of the fee was an exercise of a proprietary right (the right of preemption), not a sovereign right (the right of extinguishment). *See, e.g.*, 414 U.S. at 666-675; *Mohegan Tribe* v. *Connecticut, supra*, 638 F.2d at 616-617.

F.Supp. at 534-535. (Jt. App. at 55a-57a.) It therefore transacted with the Oneida Nation with its "eyes wide open." *Edelman* v. *Jordan, supra*, 415 U.S. at 693 (Marshall, J., dissenting); *accord, County of Monroe* v. *Florida*, 678 F.2d 1124, 1134-35 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983) (federal extradition statute); *Mills Music, Inc.* v. *Arizona, supra*, 591 F.2d at 1286 (federal copyright statute).

Fourth, Congress has been granted specific authority under the Constitution "to regulate commerce . . . with the Indian tribes." Art. I, § 8, cl. 3. One of the concerns expressed by the court in *Employees* was that congressional legislation under the Interstate Commerce Clause has "grown to vast proportions in its applications," and that accordingly the Court should not lightly infer that Congress intended such regulation to supersede state immunities. 411 U.S. at 285. This action, however, does not involve railroads, labor wages, or any of the panoply of other fields into which Congress has moved under its power to regulate interstate commerce, and which could not have been foreseen by the drafters of the Constitution. It involves a *specific* power delegated by the states, including New York, to Congress. *See County of Monroe* v. *Florida, supra*, 678 F.2d at 1133 (states specifically relinquished sovereignty in matters relating to extradition to Congress); *Mills Music, Inc.* v. *Arizona, supra*, 591 F.2d at 1285 (same, in matters relating to copyrights and patents). Accordingly, congressional abrogation of New York's immunity in this instance will not run counter to the constitutional plan, or to basic precepts of American federalism.

Fifth, and in stark contrast to *Parden*, the activity in question here was not simply subject to federal regulation; it constituted a federal crime. The deliberate commission of a federal crime surely deserves no greater deference from the federal judiciary than the negligent operation of a railroad in interstate commerce.

Finally, unlike *Employees*, a finding of waiver here will not have sweeping implications reaching to the very heart of state governmental sovereignty. While the potential liability may be large, liability will only be found where the State has illegally purchased Indian land; that activity, at most, is a rare occurrence today, and is not an essential element of state government operations. *See Mills Music, Inc.* v. *Arizona, supra*, 591 F.2d at 1285 (states will infrequently engage in ownership or infringement of copyright).

The State suggests that, even if a waiver is found, it should only extend to a direct suit brought by an Indian tribe, and not to a third-party suit brought by non-Indians. State's Brief, at 40, note. That argument, however, seeks to have the Court draw meaningless distinctions among parties and procedural contexts, with no foundation in logic or policy.

The fact that the Counties are suing the State on a third-party claim, rather than directly, should have no effect on whether or not the State is immune. Third-party practice is simply a procedural device which can neither expand nor limit the substantive rights of the parties. Thus, in *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 553-55 (1951), the Court held that where the United States had consented to suit under the Federal Tort Claims Act, such a suit could be asserted as a third-party claim as well as directly.

> Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy." [*Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29 (1926)].

340 U.S. at 554.

Similarly, the fact that the Counties are not Indians should not command a different result. The State's transaction with the original Oneida Nation has affected *both* the Oneidas and the Counties, not just the Oneidas. If the concept of constructive waiver has any vitality, it should apply to all suits against a state arising directly out of the activity leading to the waiver; anything less is simply an artificial distinction among potential claimants. As Judge Cardozo stated in *Anderson* v. *Hayes Construction Co., supra*, 243 N.Y. at 147, 153 N.E. at 29-30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Moreover, it is important to recall that the State specifically purchased the land for resale to third parties. The State's actions were thus intended to involve third parties from the first, and it should have been obvious to the State that an innocent third party would be a likely target of litigation to undo the illegal transaction.

In summary, the State utterly abandoned "the sphere that was exclusively its own" by transacting with the original Oneida Nation in 1795. *Parden* v. *Terminal Ry. of Alabama, supra*, 377 U.S. at 196. Had the State wished to limit its exposure to potential liability for violation of the Trade and Intercourse Act, it could have simply refrained from purchasing the land. It chose, however, not to do so, and its action has injured the Counties and every other innocent landowner. The State should be forced to bear the expense of redressing that injury.

* * *

As noted in the Counties' brief as petitioners in No. 83-1065, this litigation is truly extraordinary. The alleged wrong occurred nearly two centuries ago; the wronged party no longer exists; and the defendants are innocent landowners who had nothing whatsoever to do with that wrong. Thousands of similarly situated landowners now face bankruptcy and eviction from their property in order to vindicate the legislative purpose of preserving peace on the Indian frontier. If those landowners are denied the right to indemnity from the State — the party which actually violated the Trade and Intercourse Act of 1793 — this lawsuit will result in one of the most senseless and unfair judgments in the history of American jurisprudence. The Counties respectfully urge that this Court, at a minimum, place liability where it rightfully belongs.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the State, should be affirmed.

Respectfully submitted,

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